

APPEAL NO. 030009
FILED FEBRUARY 6, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 16, 2002. The hearing officer determined that respondent (claimant) is entitled to lifetime income benefits (LIBs) and that appellant (carrier) is not entitled to a reduction of claimant's income benefits based on contribution from an earlier compensable injury. Carrier appealed these determinations on sufficiency grounds. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant is entitled to LIBs. Carrier asserts that claimant had a spinal injury and that, therefore, the only way he could prove entitlement to LIBs was to show that he had "permanent and complete paralysis," citing section 408.161(a)(5). The hearing officer found that claimant was entitled to LIBs under section 408.161(a)(2), for loss of both feet at or above the ankle. The hearing officer further determined that claimant sustained "severe limitations in his ability to use his legs, to the point that these limitations have prevented Claimant from getting and keeping employment requiring the use of his legs." Carrier contends that, because a spinal injury was involved, the hearing officer erred in applying section 408.161(a)(2).

We have said that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). The hearing officer did not err in applying section 408.161(a)(2) under the facts of this case. Hartford Underwriters Insurance Co. v. Burdine, 34 S.W.3d 700 (Tex. App.-Fort Worth 2001, no writ); Texas Workers' Compensation Commission Appeal No. 021601, decided August 15, 2002. To the extent that carrier challenges the sufficiency of the evidence to support the hearing officer's determinations regarding LIBs entitlement, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Carrier next contends that the hearing officer erred in determining that carrier was not entitled to contribution in this case. Carrier asserts that the hearing officer considered lay testimony regarding contribution and ignored the medical evidence from Dr. O. However, the medical evidence in the record indicates that claimant had only a

prior sprain/strain in 1986 and that he was expected to have some soreness or stiffness for a matter of months. In considering cumulative impact and whether there was any overlapping impairment, the hearing officer was entitled to consider whether the impairment from the prior injury was reasonably presumed to be permanent. See Section 401.011(23). Given the medical evidence in this case, it was not unreasonable for the hearing officer to presume that claimant did not have any impairment from the prior injury that was reasonably presumed to be permanent. The hearing officer also did not err in taking into consideration claimant's testimony about his condition and recovery from his prior injury as a factor to consider regarding contribution. See Texas Workers' Compensation Commission Appeal No. 990237, decided March 24, 1999; Texas Workers' Compensation Commission Appeal No. 960101, decided February 29, 1996.

We affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **AMERICAN MOTORISTS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Susan M. Kelley
Appeals Judge